been a proper restriction, assuming that the doctrine of proportionality applies to a case of this nature. This court has observed in *Chng Suan Tze*[13] that disproportionality as a ground of judicial review contains within it an element of unreasonableness or irrationality. The underlying basis of the restriction order is the need to make it difficult but not impossible for the AWSJ to communicate its unwanted views to its Singaporean readers in Singapore. What is an appropriate restriction is, in our view, purely a matter for the judgment of the Minister. The court has no right to interfere with the Minister's decision in that respect unless it is made in bad faith or perversely. In the instant case, we are not prepared to substitute our judgment for that of the Minister in determining whether the restriction made against the AWSJ is out of proportion to its infractions. The appeal is dismissed. Costs reserved.

Appeal dismissed.

Solicitors: *Murphy & Dunbar.*

Reported by *Terence Tan Bian Chye*

Riedel-de Haen AG v Liew Keng Pang

HIGH COURT (SINGAPORE) – SUIT NO 771 OF 1988
CHAN SEK KEONG J
13 APRIL 1989

Civil Procedure – Interlocutory injunction – Anton Piller order – Order requiring disclosure of names of suppliers and customers of counterfeit goods – Whether order infringed privilege against self-incrimination – UK Copyright Act 1956, s 21 – UK Supreme Court Act 1981, s 72 – Trademarks Act (Cap 332, 1985 Ed), ss 70 & 74 – Consumer Protection (Trade Descriptions and Safety Requirements) Act (Cap 53, 1985 Ed), ss 4 & 14 – Charter of Justice 1826 – Evidence Act (Cap 97, 1985 Ed), ss 2(1), 134(1), (2) & (3) – Indian Evidence Act (Act 2 of 1832), s 32

Evidence – Whether Evidence Act abrogated or qualified privilege against self-incrimination – Whether privilege applicable to affidavits

The plaintiffs obtained an Anton Piller order against the defendant ordering the defendant inter alia to disclose the names of their suppliers and customers of goods bearing the plaintiffs' trademarks. The defendant applied to discharge the order on the ground that it infringed the privilege against self-incrimination.

Held, discharging the order:

(1) Before the privilege against self-incrimination ('the privilege') can be claimed successfully, it must be shown that there is a real risk that incriminating answers would expose the person concerned to arrest or prosecution for any criminal offences.

(2) Since there were two conflicting Malaysian decisions on whether the privilege was relevant to Anton Piller orders, neither of which was binding, it was necessary to consider the issue on first principles.

(3) The privilege was received into Singapore by virtue of the Charter of Justice 1826. In civil proceedings, the privilege extends to the discovery of documents which will tend to incriminate or subject the defendant to a penalty of forfeiture.

(4) The issue whether s 134 of the Evidence Act had abrogated or merely qualified the privilege turns on the meaning of the word 'witness' in sub-s (1). The word in its broad sense would mean a person who has seen a thing or an event or in its narrow sense, a person who goes into the witness box to testify to a fact or thing. The meaning of the word must be determined by the nature of the obligation that is imposed on him by the section.

(5) Subsection (1) referred to an obligation to answer to any matter relevant to the fact in issue. This implies that questions would be put to the witness, which could only be done at a trial.

(6) Subsection (3) requires the court to explain the purport of subsection (2) before compelling a witness to answer a question which will incriminate him. This implied an oral explanation by the judge.

(7) It was not enough to include in the Anton Piller order a statement that the defendant must be informed that the answer given by him in response to the order would not subject him to the risk of arrest or prosecution. (Here, as this was not included in the present Anton Piller order, the order was invalid.) Furthermore, the defendant here did not speak, write or read English.

(8) The adoption of the requirement for the statement was undesirable as it was open to abuse and could lead to disputes as to whether explanations had been given, whether the interpreter was competent to explain and whether the defendant had understood the explanation.

(9) The argument that a person who is compelled by a court order to give evidence is a witness and is therefore not entitled to the privilege, is flawed in that it begs the question, namely, whether at the stage of the proceeding before the court, the defendant was a witness compellable to answer.

(10) In addition, where the Anton Piller order was directed against the defendant, it offended against a fundamental principle of the adverserial system of justice, that the defendant has a right to remain silent and to refuse to defend himself.

(11) Section 2(1) of the Evidence Act provided that Parts I, II and III of the Act did not apply to affidavits presented to the court. Part III of the Act, deals with, inter alia, evidence and witnesses. As the definition of 'evidence' does not include affidavits, it must follow that Part III is concerned with oral evidence only, and s 134 therefore does not apply to affidavits.

(12) Section 134 of the Evidence Act has merely qualified the privilege to the extent that the witness gives oral testimony in judicial proceedings to which the Act is applicable.

Cases referred to

1 *Rank Film Distributors Ltd* v *Video Information Centre* [1981] 2 All ER 76 (folld)
2 *Lincoln International Ltd* v *Eagleton Exports Ltd* [1982] FSR 161 (refd)

3 *Television Broadcasts Ltd* v *Mandarin Video Holdings Sdn Bhd* [1983] 2 MLJ 346 (not folld)
4 *PMK Rajah* v *Worldwide Commodities Sdn Bhd* [1985] 1 MLJ 86 (folld)
5 *Haw Tua Tau* v *PP* [1981] 2 MLJ 49 (refd)
6 *Re Westinghouse Uranium Contract* [1978] AC 547 (refd)
7 *Tay Bok Choon* v *Tahansan Sdn Bhd* [1987] 1 MLJ 433 (PC) (refd)

Legislation referred to
Charter of Justice 1826
Consumer Protection (Trade Descriptions and Safety Requirements) Act (Cap 53, 1985 Ed) ss 4, 14
Evidence Act (Cap 97, 1985 Ed) ss 2(1), 134(1), (2), (3)
Trademarks Act (Cap 332, 1985 Ed) ss 70, 74
Evidence Act (Act 2 of 1832) [India] s 32
Copyright Act 1956 [UK] s 21
Supreme Court Act 1981 [UK] s 72

Lawrence Boo for the plaintiffs.
Tan Tee Jim for the defendant.

Cur Adv Vult

Chan Sek Keong J: This is an application by the defendant to discharge an Anton Piller order obtained by the plaintiffs on 21 April 1988 on the ground that it infringes the privilege against self-incrimination. The said order was in these terms:

> 4 The defendant does within seven days of the service of the interim injunction and order of court herein upon him make and file an affidavit and serve a copy on the plaintiffs' solicitors, setting forth the names and addresses of all persons, firms, or companies:
>
> (a) from whom the defendant has obtained;
> (b) to whom the defendant has supplied; and
> (c) who have ordered from the defendant
>
> the aforesaid goods bearing the plaintiffs' trade marks Riedel-de Haen which would offend the aforesaid injunction and the defendant to exhibit thereto to the affidavit all relevant invoices, orders, shipping documents and all relevant documents or copies thereof in the defendants' possession, custody or control and confirm that the transactions appearing therein refer to the aforesaid goods which are not of the plaintiffs' manufacture or merchandise.

Counsel for the defendant relies on the authority of the House of Lords decision in *Rank Film Distributors Ltd* v *Video Information Centre*[1] in support of his application. In that case, the appellants had issued a writ against the respondents restraining them from infringing the appellants' copyright to certain films which the respondents were alleged to have pirated in the form of video cassettes. The appellants obtained Anton Piller orders which required the respondents: (a) to supply information; (b) to allow access to premises for the purpose of looking for illicit copy films and to allow their being removed to safe custody; and (c) to disclose and produce documents.

It was contended by the respondents that orders (a) and (c), ie the provision of the information or production of the documents, might tend to incriminate them in respect of various offences, viz (1) summary offences under s 21 of the Copyright Act 1956; (2) conspiracy to commit a breach of s 21; and (3) conspiracy to defraud (at common law).

The House of Lords upheld the claim of privilege of self-incrimination and discharged orders (a) and (c). Their Lordships also decided that there was no way in which the court could compel disclosure while at the same time protecting the respondents from the consequences of self-incrimination since an express restriction imposed by the court on the use of any information disclosed would be binding on the appellants and not on anyone else who brought a criminal prosecution and in any event would not bind a criminal court to exclude the information as inadmissible evidence.

Consequent upon this decision, legislation was enacted in England in the form of s 72 of the Supreme Court Act 1981 to withdraw this privilege in connection with the following civil proceedings in the High Court, namely: (a) proceedings for infringement of rights pertaining to any intellectual property or for passing off; (b) proceedings brought to obtain disclosure of information relating to any infringement of such rights or to any passing off; and (c) proceedings brought to prevent any apprehended infringement of such rights or any apprehended passing off. There is no corresponding legislation in Singapore.

Counsel for the defendant in the instant case has submitted that the privilege against self-incrimination survives as part of the law of Singapore and that if the defendant were compelled to answer para 4 of the court order, his answers would incriminate him in respect of offences under the Trade Marks Act (ss 70 and 74) and under the Consumer Protection (Trade Descriptions and Safety Requirements) Act (Cap 53), ss 4 and 14.

It is settled law that before the privilege can be claimed successfully by any person, it must be shown that there is a real risk that the incriminating answer or answers would expose him to arrest or prosecution for any criminal offence. In this respect, counsel has referred to the decision of the High Court of Hong Kong, viz *Lincoln International Ltd* v *Eagleton Exports Ltd*[2] where the nature and extent of the liability was discussed. There, Jackson-Lipkin J said:

> ... both of them [counsel] tell me that I may take judicial knowledge of the fact, that in Hong Kong the Commercial Crimes Bureau and the Trade, Industry and Customs Department take passing off and infringement very much more seriously than the authorities take them in England. Indeed, there are special units in Hong Kong for seeking out infringers and passers off and for prosecuting them.
>
> I do take notice of it. It is well-known in the courts of this Colony that the Government takes a very serious view of such offences, and must do because the livelihood of the Colony depends upon our being able to shed the old image

of 'empire made' and the old image of imitators. It follows, therefore, that there is a genuine risk in Hong Kong that people – and I say 'people' advisedly – will be prosecuted for infringing or passing off. Leonard J in *Lee Shek-tang* v *R*, an unreported judgment delivered on 12 June 1979, talked about 'flagrant copying of a kind that must be stopped'.

So it is quite clear that the courts of this Colony, in applying the *Rank* case, must approach the problem differently. They must approach it on the basis that, because of our Ordinance, as opposed to the Act – and in that respect I refer to pp 674, 676, 678, 680 and 681 of the *Rank* case – because of our Ordinance, and because of our peculiar circumstances, a real and appreciable risk does exist, and the offences can by no means be considered petty, beyond the purview of the authorities, or ones to which authorities are willing to turn a blind eye; and, until those in charge of Law Reform do as England has done, and legislate to overcome the difficulties, we must apply the *Rank* case in all its strictness.

Counsel for the defendant has contended that the authorities in Singapore are no less ardent than their Hong Kong counterparts in their efforts to eliminate or suppress the scourge of piracy of intellectual property and that accordingly there is a real and appreciable risk of the defendant being prosecuted for the offences he has identified if he were compelled to comply with the court order.

Counsel for the plaintiffs accepts the submission that there is a risk of the defendant being subject to prosecution, but he contends the privilege against self-incrimination is no longer available in Singapore as it has been withdrawn by s 134 of the Evidence Act. He relies on a decision of the Malaysian High Court, viz *Television Broadcasts Ltd* v *Mandarin Video Holdings Sdn Bhd*[3] where Chan J so held in relation to the corresponding s 132 of the Evidence Act of Malaysia, in a case where an Anton Piller order was obtained against the defendant. His Lordship after analysing the English and Indian decisions came to the conclusion that the expression 'witness' in s 132 of the Evidence Act meant any person who could give or furnish evidence and not any person who testified in the witness box. Chan J said:

In my judgment, a witness is a person who gives or 'furnishes' evidence. If a person gives or is compelled by a court order (as in this case) to give evidence then he is a witness. It does not matter if he is a party or any other person. In the *Westinghouse Uranium Contract* case [1978] AC 547, the people and the companies concerned in the case were not parties to the litigation then pending in the United States. The court in the United States issued letters rogatory to the High Court in London requesting it to order two English companies to produce documents and certain named individuals to appear before a US Consular officer in London to give evidence as witnesses. The point which I wish to make is this – those named individuals and the two English companies were called 'witnesses' although at the time they were only under compulsion by court order to give evidence and to produce documents. They have not given evidence or produced documents yet. Roskill LJ described them as 'potential witnesses'... and throughout the judgments in the Court of Appeal and in the House of Lords they were referred to as 'witnesses'. As things turned out, none of them ever became witnesses at all, that is, in the sense of 'furnishing evidence', because their claim to privilege against self-incrimination was upheld by the Court of Appeal and the House of Lords.

Accordingly, his Lordship concluded (at p 356):

The first limb of this subsection (ie s 132(1)) takes away the risk of arrest and prosecution and therefore, the privilege goes ... It also at the same time (second limb) prevents the use in criminal proceedings of evidence or statements which otherwise would have been privileged.

Apart from sub-s (2), sub-s (1) by itself is wide enough to withdraw or remove altogether the privilege against self-incrimination.

However, Chan J's decision in *Television Broadcasts*[3] was not followed in a subsequent case before another judge of the Malaysian High Court. In *PMK Rajah* v *Worldwide Commodities Sdn Bhd*[4] Zakaria J, in discharging an Anton Piller order, held that the expression 'witness' in the context of s 132 was intended to refer to a person who testified on oath or affirmation in a court of law or in a judicial tribunal and who would be subject to examination in chief, cross examination and re-examination.

Counsel in the instant case relies on Zakaria J's decision. In view of these two conflicting decisions, neither of which is binding on me, it is necessary for me to consider the issue afresh from first principles. There is no doubt that the privilege against self-incrimination is one of the principles of English law which has been received in Singapore by virtue of the Charter of Justice 1826. What is in doubt is its status as a fundamental rule of natural justice in criminal proceedings in the context of the constitutional rights of an accused person: see *Haw Tua Tau* v *PP*[5] (at p 53 per Lord Diplock). In civil proceedings, the privilege extends to discovery of documents which will tend to criminate or subject the defendant to a penalty or forfeiture: *Re Westinghouse Uranium Contract*[6].

The existence of this privilege is a boon to wrongdoers and a bane to owners of intellectual property rights. In this regard, Lord Reid in the *Rank Film* case[1] said (at p 79):

It may seem a strange paradox that the worse, ie the more criminal, their activities can be made to appear, the less effective is the civil remedy that can be granted, but that, prima facie, is what the privilege achieves.

However, the fact that the privilege may operate unfairly against owners of intellectual property rights and the fact that the Supreme Court Act 1981 was passed by the United Kingdom Parliament to remedy the paradoxical situation, no doubt for policy reasons, are not considerations which should influence a court in construing the proper scope of s 134 of the Evidence Act. It should be remembered that the Evidence Act is merely a re-

enactment of the Indian Evidence Act which was first re-enacted in 1872 and s 134 itself was a verbatim reproduction of s 32 of Act 2 of 1832 (see *Sarkar on Evidence* (13th Ed) at p 132).

I now turn to s 134 of the Evidence Act which provides:

> (1) *A witness* shall not be excused from answering *any question as to any matter relevant to the matter in issue in any suit*, or in any civil or criminal proceedings, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind, or that it will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of the Government or of any other person. (emphasis added)
>
> (2) No answer which a witness shall be compelled by the court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.
>
> (3) Before compelling a witness to answer a question the answer to which will criminate or may tend directly or indirectly to criminate such witness, the court shall explain to the witness the purport of subsection (2).
>
> (4) to (7) [not relevant]

The issue whether s 134 of the Evidence Act has abrogated or merely qualified the privilege against self-incrimination turns on the meaning of the word 'witness' in sub-s (1) thereof. The word 'witness', like many words in the English language, is capable of a broad or a narrow meaning, depending on the context in which it is used. In a broad sense, it means a person who has seen a thing or an event and is able to testify to it when called upon to do so: he is a potential witness if that fact or thing is required to be proved. In a narrow and more technical sense, it may refer to a person who goes into a witness box to testify to a fact or thing, the existence of which may be in issue. He may be a voluntary witness, having agreed voluntarily to testify or an involuntary witness, having been subpoenaed to testify. A witness in this sense need not be a party to the proceedings, but a party who gives evidence in his own behalf is also a witness in this sense.

In the context of s 134, the meaning of 'witness' must be determined by the nature of the obligation that is imposed on him by that section. Subsection (1) refers to the obligation to answer any question as to any matter relevant to the matter in issue. It implies that a question or questions will be put to the witness: that can only be done at a trial by counsel examining or cross-examining him or by the court. That question must also be relevant to the matter in issue. Until the question is asked, no one can say whether it is relevant to the matter in issue. (Indeed, it is arguable that in a claim for damages for infringement of intellectual property, the sources of supply and the identities of the suppliers are not relevant to the issue of infringement.) Subsection (3) requires the court to explain to the witness the purport of sub-s (2) before compelling him to answer a question which will criminate or tend to criminate him. Again, this implies an oral explanation by the judge either directly if the witness speaks and understands English or indirectly through a court interpreter if the witness does not speak or understand English and that can only happen when the witness is giving evidence.

In *Television Broadcasts*,[3] the learned judge sought (see p 358) to overcome the requirement of sub-s (3) by directing that there be included in the Anton Piller order a statement that the defendants must be informed that the answer given by them in response to the order would not subject them to the risk of arrest or prosecution etc. In my view, the inclusion of such a statement is not sufficient compliance with s 134(3) which says that the *court* shall explain to the witness. The Anton Piller order is only a court order. It is not the court. If the statement is read out by way of explanation to the defendant, it will presumably be done by the plaintiff or his solicitor. That is not an explanation by the court. That the decision in *Television Broadcasts*[3] is wrong is, in my view, reinforced when applied to the circumstances of the case before me. Here, the defendant does not speak, write or read English. Assuming that the Anton Piller order in the present case did contain the form of the suggested statement (which it did not, which provides a specific ground for its invalidity in any event but which does not affect the reasoning here) and that the statement had been interpreted to the defendant, it would still not have amounted to an explanation by the court. The adoption of such a procedure is also undesirable. It is open to abuse and will lead to disputes as to whether explanations, much less accurate explanations, have been given, whether the interpreters are competent to explain and whether defendants have understood the explanations.

In *Television Broadcasts*,[3] the learned judge reasoned that 'a witness' is a person who gives or furnishes evidence and if a person gives or is compelled by a court order, ie the Anton Piller order, to give evidence, then he is a 'witness'. In my view, this reasoning is flawed in two respects. First, in the context of s 134, the conclusion begs the question, the question being whether *at that stage of the proceedings before the court*, the defendant was a witness who was compellable to answer. Secondly, in a more general context, where the Anton Piller order is directed against the defendant, it offends against the fundamental principle that in an adversarial system of justice, such as ours, the defendant has a right to remain silent and to refuse to defend himself. He can never be a witness unless he voluntarily agrees to testify. The corollary of this principle is that a trial judge has no power to dictate to a litigant what evidence he should tender: *Tay Bok Choon* v *Tahansan Sdn Bhd*[7] at p 436.

For the above reasons, it is clear to me the the witness referred to in s 134 is the person who is testifying at a trial or other judicial proceedings where the Evidence Act is applicable. There is a final consideration which puts this interpretation beyond doubt. Section 2(1) of the Evidence Act provides as follows:

> Parts I, II and III shall apply to all judicial proceedings in or before any court but *not to affidavits presented to any court* or officer nor to proceedings before an arbitrator. (Emphasis added)

Section 134 appears in Part III of the Act (comprising ss 103 to 168) which deal with, inter alia, evidence and witnesses. As the definition of 'evidence' in the Act does not include affidavits, it must follow that Part III is concerned with oral evidence only.

I am therefore of the view that s 134 of the Evidence Act has merely qualified the privilege against self-incrimination to the extent the witness gives oral testimony in judicial proceedings to which the Evidence Act is applicable.

In so far as the instant case is concerned, and whatever may be the effect of s 134 of the Evidence Act, s 2(1) thereof has the effect of invalidating the Anton Piller order contained in para 4 of the court order of 21 April 1988. Accordingly, the order must be discharged with costs.

Order discharged.

Solicitors: *Haridass Ho & Partners*; *Allen & Gledhill.*

Reported by *Terence Tan Bian Chye*

Peter Tham Wing Fai v Public Prosecutor

HIGH COURT (SINGAPORE) – MAGISTRATE'S APPEAL NO 324 OF 1988
CHAO HICK TIN JC
5 APRIL 1989

Criminal Procedure – Sentencing – Principles guiding appeal court in interfering with trial judge's sentence – Whether appellant should be subject to deterrent sentence – Whether sentence should run consecutively with prior sentence – Penal Code (Cap 224, 1985 Ed), ss 406 & 409 – Companies Act (Cap 50, 1985 Ed), s 157(1) – Criminal Procedure Code (Cap 68, 1985 Ed), s 234

The appellant was convicted by the district judge on a charge under s 406 of the Penal Code for criminal breach of trust. He was sentenced to a term of two years' imprisonment which was ordered to take effect from the expiry of the present eight-year term of imprisonment the appellant was serving for his earlier conviction on 36 forgery charges. The appellant appealed against sentence on the grounds that two years' imprisonment was manifestly excessive and that the trial judge did not exercise his discretion judiciously when he ordered the present sentence to begin only after the expiry of the current eight-year term. On the first ground, the appellant argued that the judge had taken into consideration the background facts set out in the statement of facts. Those facts it was said related to charges which had been withdrawn by the prosecution.

Held, allowing the appeal in part:

(1) An appellate court in considering an appeal on sentence should interfere if it is satisfied that the sentencing judge has made the wrong decision as to the proper factual basis for sentence, there has been an error on the part of the trial judge in appreciating the materials before him, the sentence was wrong in principle or the sentence imposed was manifestly excessive.

(2) Here, from the first two paragraphs of the grounds of decision, it was clear that the trial judge had allowed the other events surrounding the Pan-El and GIH (two companies with which the appellant was associated) to affect his decision as to the appropriate sentence to be imposed.

(3) It was equally clear that the judge was imposing a deterrent sentence. There was also no link between the present charge and the 36 charges of forgery that the appellant was convicted of and even if there was such a link, the appellant was already serving a deterrent sentence of eight years for these offences.

(4) To impose another deterrent sentence now on this charge would tantamount to making the appellant suffer double deterrent sentences arising out of basically the same matrix of facts.

(5) There were good mitigating factors in this case, namely, full restitution having been made, the appellant pleaded guilty to the charge, the prosecution's costs had been paid, a full and final settlement of all outstanding matters with the Pan-El group had also been affected. The prosecution also did not press for a deterrent sentence. The discount for a plea of guilty should be substantial.

(6) Bearing in mind all these, the sentence of two years' jail was manifestly excessive, although a fine would be quite inadequate. The prison term would be reduced to one year.

(7) Having regard to all the circumstances as a whole, there was more than an even chance that the trial judge might, considering the reasons which he gave when sentencing the appellant to the eight-year term, have ordered that this sentence should run consecutive to the eight-year term. It was not wrong of the judge to order that the present term should take effect only after the expiry of the eight-year term.

(8) The appeal was accordingly only allowed to the extent that the sentence was reduced to one-year imprisonment.

Cases referred to

1 *Peter Tham Wing Fai* v *PP* [1988] 2 MLJ 424 (refd)
2 *Tan Koon Swan* v *PP* [1987] 2 MLJ 129 (folld)
3 *Khoo Ban Hock* v *PP* [1988] 3 MLJ 22 (refd)
4 *Elsie Florence Carey Albert Ames* (1988) 26 Cr App Rep 133 (distd)

Legislation referred to

Companies Act (Cap 50, 1985 Ed) s 157(1)
Criminal Procedure Code (Cap 68, 1985 Ed) s 234
Penal Code (Cap 224, 1985 Ed) ss 406, 409

Denis Tan for the appellant.
Roy Neighbour (*Hamidul Haq* with him) for the respondent.

Cur Adv Vult